IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

MISSION ROCK COMPANY, Substituted for California Dry Dock Company,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 682.

BRIEF OF APPELLEE.

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In 1850 California was admitted into the Union upon an equal footing with the original States, and succeeded to certain sovereign rights. She has, as an incident to this sovereignty, a title in her tide and submerged lands lying within her exterior boundaries. This is an undisputed principle of law; one which the Government of the United States does not seek to attack; but, on the other hand, one which it will always defend, and a right which it will ever guarantee.

How far this sovereignty of the State can be made to interfere with and destroy that which was primarily a right of the Federal Government, and with which the Federal Government has never parted, will be considered hereafter.

At the time of the admission of California into the Union, Mission Rock and the adjacent rock projected above ordinary high water mark in the bay of San Francisco, so that their area was fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively. At

that time they were steep and precipitous, not admitting of what is termed "tide lands"; that is, land covered and uncovered by the ebb and flow of the tide, and all lands around them were wholly and entirely submerged.

Generally speaking, in this brief, unless otherwise apparent, an allusion to "Mission Rock" shall be intended as including both Mission and the adjacent rock.

Appellee, in support of its claim, seeks first to show that the title to these islands was in the Government of the United States, as the title to all lands not especially disposed of was in the Government by virtue of the treaty of Guadalupe Hidalgo. That treaty imposed upon the Government the obligation of assuring title to the grantees of the Mexican Government, and Congress passed certain acts creating provisions for the purpose of ascertaining these titles; the Courts of the country were given jurisdiction thereof; Spanish and Mexican private and public grants were regularly confirmed, and those entitled thereto, or their heirs or assigns, were finally given patents.

These rocks were entirely without the boundaries of any of these grants; the primary title to them was in the Government; they did not go to the State by reason of its sovereignty, as they were not tide nor submerged lands, and the Government has never by any act parted with its title.

Appellant claims to derive title from the State of California by virtue of an act of its legislature, approved April 4, 1870, and a patent issued in conformity therewith. This will be further considered.

It was first contended that, under the act of Congress of the United States of July 1, 1864, the title to these rocks passed from the Government. It was admitted that title did not otherwise pass. Appellant seems to have aban-

doned this position and contends now that said act did not purport to convey these lands. We will hereafter meet appellant upon that ground and endeavor to show that, there being no other statute to pass this title from the Government, the title still remains in the original owner under the treaty.

Let us first suppose that the act of 1864 was intended to include Mission Rock. It then appears that the title would pass to the city of San Francisco, and not to the State. It is, however, noticed in said act that in order to perfect title, a condition precedent is to be performed.

Under the rule that in construing grants from the sovereign, it is to be construed against the grantee and not against the grantor, the nonperformance of this condition could in nowise work an injury to the grantor. The Government cannot suffer from laches; but if it could, then can the apppellant, who claims title from the State of California, complain of the laches of the Government in this regard? If these conditions had been performed, and the title passed from the Government, it would have gone to the city of San Francisco. The city of San Francisco is the only party to interfere and claim title for its own by operation of this act. The city has always and does now acquiesce in the position of the Government of the United States in this suit, which gives the United States a perfect standing in court with reference to its right. If there are laches they are on the part of the city. But so long as the map has not been rendered, and the city has never sought to have it rendered, and the President of the United States has, anticipating such event, made his order, so long the United States has the right to maintain its claim in the courts, and its rights are undisputed.

A fair construction of the act of 1864 leads to the con-

clusion that the President was acting within his authority in making his order and reserving from its operation the particular land in dispute.

Let us examine section 5 of said act. It provides that the President may, within one year after the rendition to the general land office by the surveyor general of his approved plat, make his order reserving said land. While he is entitled to this notice, yet he is not compelled to await it in order to have jurisdiction. If the necessities of the Government call for the setting aside of this island for naval purposes as an immediate act, the President of the United States would not be compelled to await such rendering, which might, if delayed, bring the Government face to face with national emergencies. The only essence of time in the act is, that the order shall be made "within" one year from rendering the plat; and the date of the executive order, so long as it was after the passage of the act which authorized it, and within the maximum time permitted, would not be an essential element in determining the question of the authority or jurisdiction on the part of the executive. While the act of the surveyor general could, by acting in conformity with law, limit the time of executive action, he cannot confer it. There are no presumptions against the Government nor against its chief officer. The filing of the plat is in nowise a limitation upon his action, except in so far as it compels him before and "within" a given time to make his order. The rendering of the plat is a condition precedent to title. Title does not pass *eo instanti*, and in the absence of fulfilling the condition precedent, title could never become perfected. There is nothing in the act, nor in any other act, which compels the surveyor general to render said plat save upon a certain application to be made by the city, and

there is an absence of evidence that the city ever took action in the matter. The reasons why the surveyor general did not file his plat are presumed to be good. If they are not good, appellant should tell us why.

We submit that all of the intendments of the law are in favor of the sovereign; the city, if anyone, is guilty of laches and surely cannot profit thereby as against the sovereign where all favorable presumptions reside. This rule is so explicitly stated, so well guarded, that it becomes a part of every construction from the public to an individual. If the act required the map to be rendered within a certain time, then such time computed with the year following, might be construed as a limitation on the discretion of the executive. This is not the case. If the city has any rights under this section, it is authorized to enforce them in equity or in the act itself; and so long as the city does not seek to do this, it cannot work as a limitation against the grantor. There is nothing in the act compelling the surveyor general to render his plat unless it is the part which requires him to act upon the application of those mentioned as beneficiaries thereunder.

Why did not Congress say "within one year from the passage of the act," or within one year from some particular and definite date? It was simply intended that the filing or the rendering of the plat by the surveyor general should be in the way of a *notice* to the *Government of the United States, of the extent and area of the exterior limits of San Francisco.* Then upon such notice, the Government being *advised* as to the lands so comprehended could make its reservations within the exterior limits and with a knowledge of the lands therein. Why is not the surveyor general required to render his plat within a

given time? If then the United States is entitled to this notice and the notice is not given, it is not bound.

There is nothing in the point urged by appellant that the United States Government is bound by the laches of its own officer, the surveyor general. In the first instance the United States could not be bound for the nonperformance of a condition *directory* as to time. In the second place the officer spoken of in the act is the surveyor general of the State of California, and he is supposed to act only upon application of the city under section 6 of said act of Congress.

The act of July 23d, 1866, 14 Statutes at Large, p. 240, seems to settle the question of the passing of the title to these islands, as it takes all lands not confirmed to San Francisco, without the purview of the act of 1864. It provides in section 6 that if the surveyor general has not within a specified time filed his map, that "it shall be "the duty of the surveyor general of the United States "for California, as soon as practicable after the expira- "tion of ten months from the passage of this act, or such "*final confirmation hereafter made*, to cause the lines of the "public surveys to be extended over such land, and he "shall set off in full satisfaction of *such grant*, and accord- "ing to the lines of the public surveys, the quantity of "land *confirmed* in such *final decree*, and as nearly as can "be done in accordance with such decree. And all the "land not included in such grant as so set off, shall be "subject to the general laws of the United States."

It would appear that should the surveyor general cause the lines of the public surveys to be extended over such land, and should render his plat upon "such final confirmation," he is required to set off according to the lines of the public surveys, the "quantity of land confirmed in such final decree" and all the land, which of course includes Mission Rock, not included in such grant

so set off, shall be subject to the general laws of the United States. In other words, shall be a part of the public domain, because appellant confesses that lands subject to the general laws are public lands.

Except in this matter, there appears to be no law requiring the surveyor general to render his plat, and this law provides what the plat shall include, and that all parts excluded shall remain a part of the public domain, or subject to the general laws.

It is here seen that the act of 1864, in so far as it could part title to Mission Rock, has been repealed, and repealed before it could operate to pass title. At least Mission Rock has forever been taken from its purview.

The act of 1866 says that "all lands not included in such grant as so set off shall be subject to the general laws of the United States."

We find that the act of 1864 contemplates a plat to be rendered in connection with the public surveys.

We find that the act of 1866 requires such public surveys to be made and the exterior limits of San Francisco to be ascertained as determined by decree of confirmation. We find the plat is to be rendered according to such decree. We find Mission Rock not included; and we further find that it "shall be subject to the general laws of the United States." So whenever the plat is rendered, and Mission Rock is excluded, as it must be excluded according to the decree of confirmation, it becomes a part of the public domain and subject to the "general laws of the United States."

It is, however, contended by appellant in large type that, "The act of 1864 did not relinquish any claim of the United States to tidal lands or of rocks in the bay. Hence, the President's reservation of 'Mission Rock' was nugatory."

Let us admit this. What, then, are the conclusions?

First: That the title of the Government not being relinquished by the act of 1864, is reserved without executive order.

Second: That the executive reservation being "nugatory"—not being required—it did not effect to add to or take from an existing valid title.

If appellant's contention that Mission Rock passed to the State by virtue of sovereignty, what could the act of 1864 and the executive order thereunder avail, as title in such event would have passed to the State on the 9th of September, 1850? What comfort can appellant find in the idea that the Government did not lose title under the act of 1864?

Let us concede that the ordinance of San Francisco, the act of the legislature of California incorporating the city, and the act of Congress, *in pari materia*, are to be construed together as emanating from one legislative body.

That Mission Rock is not intended to be included as land to be reserved by the President in order to be reserved in law. We then find that the Government has such a title in the rock as it would be compelled to have in order to make the act of 1864 apply, if, by direct terms, it was made to apply. So we find that the Government has just as good a title without the act of 1864, as with it. Indeed, the effect of the reservation of the President would not need to be questioned; as in such case the reservation would be in law—the very highest law under the Constitution—a treaty.

The contention seems to be made that these islands passed to California as an incident to sovereignty. This pretense is extravagant and sometimes revolutionary.

Appellant contends that lands not classified for pur-

poses of public disposal are not public lands and pass to the State. If this is true, what kind of a limited title has the sovereign nation acquired by virtue of treaty-making power?

It is a contention that the Government cannot hold land as a proprietor, and that all territory passes from it unless specially reserved. This cannot be law; and the numerous decisions cited do not so contend.

We here advance the proposition that all land, unless otherwise provided, must be in the Government; if the Government has not provided laws especially applicable thereto, that such title shall remain unimpaired until the Government, in its wisdom, shall pass such laws.

In order that the United States may have title in the rocks, it is not necessary that they shall come within the classification of "public lands," as said terms are employed to designate certain land for public disposal.

Volume 10, Decisions of the Department of the Interior, says: "The words 'public lands of the United States' are used to designate such lands as are subject to sale and disposal under the general laws, and do not include all lands to which the United States may have the legal title, or lands that may be granted or disposed of by the United States."

This seems to hold that the lands of the Government not included within those classified as "public lands" may yet be lands to which the Government has title, and lands "that may be granted or disposed of by the United States."

It would seem a singular rule indeed that the Government, in order to retain title to its lands, should have to pass some law so classifying them as to require that they be disposed of at public sale.

This decision cites Newhall vs. Sanger, 92 U. S. 761, wherein it is said: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or disposal under general laws"

It is seen under the law of 1851, as well as 1866, that all lands excluded from the surveys made in accordance with the decrees of the Courts, are to be subject to "general laws."

It is admitted that the right to dispose of the public lands shall remain unimpaired in the Government; and it must be admitted that the Government shall have its own time to enact its own laws providing for such disposal; and in the absence of any particular law including a particular character of land, where such land does not pass to the State by virtue of any sovereignty it possesses, the Government still has its title and may reserve the same, or may take some future and remote period to enact a law for its disposal; and there can be no inference under the rule which carries title in tide and submerged lands that would carry the title to the uplands, because the line to be drawn and the legal distinction to be made between the uplands and the tide lands are as clear and distinct as the reasons which separate them.

On page 369 of said decision it is held that uplands are those over which the public surveys have been extended, or over which it is contemplated to extend them that while it is the ordinary custom to extend the surveys only to the tide, yet this is not an infallible rule where there is a reason against it. If it was an infallible rule, the surveys would never be extended over the Government islands; and in this particular case we see by the records, that the public surveys were extended over this land in 1864.

By section 13 of the act of March 3, 1851, 9th U. S. Stats. at Large, page 633, it is provided:

"That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as a part of the public domain of the United States."

We have already seen by the act of 1866 that "all the lands not included in such grant so set off shall be subject to the general laws of the United States."

It will be noticed that this act is a general clean-up; and after a period from 1851 to 1866, devoted by our Courts to the settling of land claims in California. It provides for the final survey of all lands confirmed by the Courts, and reserves a title in the Government to all lands not so included. This was simply declaratory of law, as it was intended that the Government was to guarantee to Mexican claimants certain lands and retain all other titles in uplands to itself.

What is the difference about the executive reservation under the act of 1864? If it was necessary under such act to make it, it has been made. If it was not intended by said act to include Mission Rock, then it was not intended that such executive reservation was necessary to title.

THE APPELLANT IN THIS CASE CLAIMS TITLE BY VIRTUE OF AN ACT OF THE LEGISLATURE OF THE STATE OF CALIFORNIA OF APRIL 4, 1870, STATUTES OF CALIFORNIA FOR 1869, PAGE 881.

A review of the language of this act becomes interesting in determining the extent of title derived from the State. Section 1 authorizes Henry B. Tichenor to make a survey of the lands "belonging to the State" situated in the city and county of San Francisco and included within those boundaries. Take in connection with this the language of said section after the descriptive part, and it speaks of the lands which shall be shown by such survey and map to lie below ordinary high-water mark"; that portion only to be assessed for its value, and to be paid for by the grantees. The patent issued thereunder recites: "Said tract being a tract including the rock known as Mission Rock, and containing 14.35-100 acres *exclusive* of said rock. Take the words "exclusive of said rock" in connection with the language of the statute which authorizes the issuance of the patent, the whole design of the legislature seems to have been to except from the operation of its statute, Mission Rock itself. This seems to be conformable to the idea that the State had its right in the tide and submerged lands, or, as the statute said, "that which lies below ordinary high-water mark"; and that it had not the right to grant that piece of land which is described in the patent itself in the language as "said rock." The title of the rock seems by this to have been left entirely without the purview of the act. We do not consider for an instant that the State, had it so desired, could have granted title to the rock, but urge this to show that it did not so intend, and that its inten-

tion was governed by the knowledge that it had not the right.

In the latter part of section 2 of the act of the legislature above quoted, we find a proviso which reads:

"That such patent shall not be issued until such Tichenor, his heirs or assigns, shall have constructed a marine railway or drydock at said Mission Rock."

If there was any question as to the intent of the legislature of the State of California to exclude Mission Rock and the adjoining rock, it might be cleared by a reference to its title: "An act to provide for the sale and conveyance of certain submerged lands," etc. It is noticed in this that it refers exclusively to submerged lands; not to the rock itself, nor does it deal with the tide lands, which, as is shown in this case, were insignificant and could not properly be so classed. In fact, the lands covered and uncovered by the ebb and flow of the tide were only those on the sides of the rock which were steep and precipitous. That the legislature intended to grant simply an easement in these submerged lands, in order that such easement might subserve a public purpose, is illustrated in the condition annexed that the grantee was required to construct a marine railway at the rock. In so far as the grant evidenced any other intention, it was void. So far as the essence of this easement becomes destroyed, the title thereto becomes void. It was never contemplated that he could fill in and make more land upon which to construct a railway, but that it should be constructed "at the rock"; and it was properly supposed at the time that the submerged lands would be used for a general utility in building wharves and perfecting other structural conditions for shipping. We have seen that the very easement has been destroyed; that that quality and essence which made it possible for

the State to own it as an incident to sovereignty has been removed, and that it has been replaced by land which has added to the area and extent of the public domain. It is seen that the filling in of the submerged lands around the rock was not of the condition precedent to patent, was not done before patent issued, and, as a matter of fact, was never contemplated in the intent and meaning of the grant. If there is a reversion of title, where does it lie? Is it in the State, whose grantee has destroyed the essence of its sovereignty? No; it lies not in the State, which would in that instance be taking advantage of its wrong, but the reversion would lie in the general Government, reserving title without impairment to its public domain; it would lie in the littoral owner who has the primary right to all incidents of title. Now, the query is, What kind of title could the State grant in submerged lands to people or persons other than the littoral owner? Modern decisions all point to the theory in law that so far as the title of the State is concerned in its submerged lands, it is a title conferred only by reason of its sovereignty, and in this it will be found incident to sovereignty only because it is necessary in the exercise thereof. This seems to qualify the title of the State in its tide lands and submerged lands, and to make of it a usufruct or an easement to be held in trust for the people of the United States as well as for the people of the State.

In the great case of Illinois Central Railroad Company vs. Illinois, 146 Federal Reporter, 434, this doctrine was thoroughly sifted. The legislature of the State of Illinois had, by grant given to the railroad company, along the shore of the lake quite a wide extent of land running into the lake. This land was filled in, and the very source of title was destroyed under which the railroad

company maintained its claim. The legislature of the State repealed the law granting the land, and it was held, in that instance, that the state had but the trust; that it could grant nothing else, and that a destruction thereof ended the title of the company. It will be noticed that the title of the State by Tichenor was in the nature of a trust or an easement.

It is well to review the doctrine of State sovereignty in its submerged lands to see how far and to what extent it might be invoked to the utter destruction of the proprietary rights of an individual or of the general Government. The doctrine of State sovereignty in lands covered by navigable waters finds its first enunciation in the celebrated case of Pollard's Lessee vs. Hagan, 3 Howard, 212. In reviewing this case it is necessary to take into consideration the conditions of the country at that time, the traditions which hemmed in our nation's progress, and which of necessity had to be dissipated by the onward march of civilization.

The doctrine is laid down, and it is unquestioned, that the State of Alabama is admitted into the Union upon an equal footing with the original States; but it will be noticed that in that celebrated case the reason given therefor is that the territory which included Alabama was ceded to the Government, and all the intents and purposes in the deeds of cession were to be carried out in the formation of the new State; in other words, it is substantially held that the title to the public lands never passed to the general Government absolutely, but that they were held in trust, the conditions of which were expressed in the acts of the legislature of Virginia and Georgia. While it is admitted that all of the new States came into the Union upon an equal footing with the oiginal States, so far as their sovereignty is concerned,

yet we submit that when it comes to a question of tenure of lands, that acquired by the general Government under subsequent treaties rests upon a different idea, and that the general Government is never obligated in these modern instances with the peculiar trusts incident to the grants of cession from the States.

It appears with reference to the Northwest Territory and the other territory ceded to the Government by the States that those States making the cessions were the grantors. The Government of the United States as grantee held it *temporarily* and in trust for the States to be formed. We have grown out of that; the national breadth and growth of the country, its emergencies and exigencies, have taken us beyond the scope of such a construction. The United States owned all of the land in California as a primary and absolute owner, charged only with the trust of preserving to the grantees under the Mexican Government titles to certain lands. For the purposes of municipal sovereignty, the *jus publicum* in the land under navigable water was reserved for and finally passed to the State. These are the only conditions which take lands from the purview of absolute ownership, remaining in the Federal Government.

Let us review for a moment the decision of the learned Judge in Pollard's Lessee vs. Hagan. If we find fallacies enunciated, yet at the time deemed sound, that is one reason why we must view with apprehension, much of the tenor of that decision as it relates to the present. In order to illustrate the narrow limits within which it would confine the sovereignty of the nation, we desire to make a few quotations from it. "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which

Alabama or any of the new States were formed, except for temporary purposes, and to execute the trust created by the acts of the Virginia and Georgia legislatures," etc.

The doctrine which holds that the general Government could hold the land only for "temporary purposes," might have been in consonance with a fair construction of the deeds of trust from the older States with reference to those lands; but can it be applied to the sovereignty over the public domain of the country acquired from sources other than from said States? Could it apply to land since acquired by the Federal Government by virtue of the exercise of its sovereign right and power? No. But with reference to all of the lands acquired under the treaty of Guadalupe Hidalgo, the Federal Government is a sovereign standing upon an equal footing with the most powerful nations of the earth.

One of the conditions of the deeds of trust with reference to the lands given by the States was, that all of the land "not reserved or appropriated to other purposes should be considered as a common fund for the use and benefit of all the United States, to be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatever." Is it fair to say that, in order to concede to California an equal footing with the original States, the Government of the United States, with reference to the lands within the limits of this State, is cribbed and crammed by the same qualifications of title implied in the language above quoted? Most of the land ceded to the States in those early times were made subject to a Government provided in the Ordinance of 1787, enacted at a time when the States had the full measure of sovereignty as nations, and before they had yielded them in our present Constitution. It provided, of course,

that the States to be formed out of the cession known as the Northwest Territory should be upon an equal footing with the original States in all respects whatsoever. The Ordinance of 1787 was a great document. Many of its expressions guaranteeing Republican Government were preserved in the Constitution which followed it. We cannot, in all respects, follow it with a strict construction. Within the original States the Federal Government never owned an acre of land, and never was in respect to anything a grantor. The great trouble about the decision to which I am referring is that it is too narrow and confined for the times in which we live. Its idols long ago have been shattered, and the country is now marching upon a broader domain. As an illustration of this, let me point to the fact that the decision held that the United States did not have the sovereignty of "eminent domain." To quote its language:

"And, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative because the United States have no Constitutional right to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of the State or elsewhere except in the cases in which it is expressly granted."

It would be a waste of time to show in how many instances this doctrine has been overthrown, and how the exercise of municipal jurisdiction and sovereignty, with reference to eminent domain, is evidenced by the proceedings of our Courts almost monthly.

The decision further says, speaking of Alabama, that "She succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was

diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it." In other words, the United States, under the deeds of cession from the original States, never held a foot of land as a sovereign, but as a trustee for temporary purposes; and when the State was once formed, municipal sovereignty, even in reference to eminent domain, passed beyond the United States and to the State.

It further speaks of the right of the United States in and to these lands as follows: "This right originated in voluntary surrenders made by several of the old States of their waste and unappropriated lands to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt incurred by the war of the Revolution. The object of all the parties to the contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as the purpose could be accomplished, the power of the United States over these lands, as property, was to cease."

It can be understood by this language that in determining the quality of the title of the United States to these lands, reference had to be made to the resolution of the old Congress of the 6th of September, 1780, which recommended to the States these cessions in aid of the Government in discharging the debt of the revolution. This was before the adoption of the Federal Constitution and before the present Government was charged with its responsibilities and given any degree of sovereignty. We know how lame and halt a thing the Government was under the articles of Con-

federation; and it might have well been anticipated at that time, lacking sovereignty as it did, that it was unable to hold these lands except in trust.

Further the decision says: "We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession."

This refers to the 16th clause of the 8th section of the first article of the Constitution.

The learned Court determined that the United States held the lands by virtue only of the deeds of cession and not by virtue of any sovereign right over the territory. Is it not admitted now, that what the United States owns in the way of public domain is by virtue of her sovereign treaty making power, and that she holds the sovereign right of eminent domain over all of her territories.

I have not quoted from the language of this decision for the purpose of in anywise disturbing the doctrine of the sovereignty of a State in its tide and submerged lands, but simply to show the growth of our system with reference to the public domain, and to illustrate the growth of the right of the general Government in its own territory on the one hand, and on the other, the absurdity of the proposition that the municipal right of sovereignty existing in the State Government can be invoked to disturb or destroy the right of the general

Government in and to the things which it possesses, not as grantee from the State, but by virtue of a treaty which it had the right to make.

In Black's Pomeroy on Water Rights, section 237, under the head "Title of the United States to the Tide Lands of Territory," we find this very decision discussed, and I will quote some of the language: "It is true that a new State must be admitted into the Union on an equal footing with the older States, but this does not imply that it must be an owner of an equal amount of territory, or equally the source of title to all the lands within its boundaries. If this were so, the United States would never dispose of an acre of public land, inland or shore. The equality spoken of is political equality. And the sovereignty of the new State has nothing to do with its proprietary rights. Though it may not own any portion of its shore, it is sovereign over that shore, as much as over any portion of its territory. For it will always retain the *jus publicum*, which can never be alienated either by the United States or by the State itself. It is this alone which is held in trust for the future State. And the remarks made in Pollard's Lessee vs. Hagan can properly be carried no further than this.

Further: "The true doctrine is, that the United States may validly sell or otherwise dispose of the tide-lands bordering the coast of a territory, subject to the municipal control, or police jurisdiction, or the *jus publicum* of the future State; and that when that State is admitted into the Union, it acquires the control as sovereign over all its shore, and as sovereign and as proprietor over all such lands not previously granted away by the United States."

In other words, the title of the United States is by virtue of its sovereignty and not as a trustee; and should

it dispose of tide or submerged lands in this territory, the future State is bound by its grant, so far as the *jus privatum* is concerned.

Further quoting from section 237: "The rights and power of the general Government in respect to land of which it is the proprietor cannot thus be restricted on the fanciful notion of a 'trust' for a possible future State. It would scarcely be contended, for example, with any degree of seriousness, that the United States cannot lawfully convey to private persons lands embracing portions of the shore of Behring Sea, merely because in the remote future Alaska may possibly be erected into a state."

In the case of Case vs. Toftus, 39 Fed. Rep. 730, arising in the State of Oregon, a learned and accomplished Judge gave his views upon the question as to the power of the national Government in its public domain. He accepts the theory first enunciated in Pollard's Lessee vs. Hagan, that the ownership of the tide and submerged lands are an incident to the sovereignty of the State. He says: "How or why this is so, except to bolster up some fanciful notion of State sovereignty, I never could perceive."

In quoting this, it is not with the design of discrediting the doctrine, but in order to show that its operation must necessarily find a check in the mind of modern thinkers, in view of the many grave questions to be settled within the rights and sovereignty of the Nation.

He further says, referring to the case of Hinman vs. Warren, 6 Or. 408: "The Court went further and held that the United States cannot dispose of the tide lands, even in a territory. This decision is also based on the dogma of State sovereignty; that is, the sovereignty of a

State *in futuro*, which is yet, so to speak, *in utero*, or the womb of time, and may never be born."

To show that the construction of the words "upon an equal footing with the original States" means a political equality, he uses the following language: "But what is considered, and has been held by the Supreme Court to be the general character and purpose of the Union of States as established by the Constitution, is a Union of political equals." In other words, the equality between the States does not rest upon the obligations created in the grants of cession by the original States to the general Government of territory, but it is a constitutional equality guaranteeing for all of the States a Republican form of Government.

The learned Judge further says: "The true constitutional equality between the States only extends to the right of each, under the Constitution, to have and enjoy the same measure of local or self Government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national Government.

We find in the celebrated case of Illinois Central Railroad Company vs. Illinois, 146 Federal Reporter, 434, the following language:

"The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the State was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within

their respective limits. The boundaries of the States were prescribed by Congress and accepted by the State in its original Constitution."

So we see by this that the equality depends upon the fact that they are States under the Constitution, and not that they have received particular sovereign powers delegated or prescribed by the deeds of cession from the original States.

While that is a doctrine too familiar now to discuss, yet it reminds us of the primary principles, and shows the fair and broad construction placed upon it by the fathers of the Constitution. It points out the false prophecies lurking under the shadow of State's rights, and tends to show the modern tendency to again go back to first principles and view the power of the Government as the outgrowth of the same.

Discussing again the case of Toftus, the learned Judge says: "In the territories the National Government is both the sovereign and proprietor. Congress has the power to govern them, and in so doing exercises the combined power of the National and State Governments.

[Citing Insurance Co. vs. Canter, 1 Peters, 542.]

"And as such sovereign and proprietor it may dispose absolutely of all the public land in the territory, whether high or low, wet or dry. For the time being, as sovereign, it has the *jus publicum*, or right of jurisdiction or control of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the *jus privatum*, or right of private property, subject to the *jus publicum*."

It will be noticed in this particular case in controversy that the Federal Government had the *jus privatum*, the rights of a proprietor in the rocks, and that those rights were retained and never passed to the State.

In order to show that the United States holds the absolute title to its territory, and not in trust for the future State, I will quote from the same learned Judge in the case of Shively vs. Welch et al., 20 Fed. Rep. 32:

"Upon the admission of the State into the Union, such bed and shores, *not otherwise disposed of* by the United States, became the property of the State in its sovereign capacity, and subject to its jurisdiction and disposal."

It is seen that the United States has the right to otherwise dispose of the same prior to the formation of the new State.

Further, the Court says: "In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void."

This appears to have set out clearly the fact that the grant was void so far as it seemed to convey the right to obstruct navigation. Let us ask: Did it not in this particular instance assume to convey the right to obstruct navigation? Can it be pretended that a limit placed upon the action of appellant by the Government engineers would make a grant valid, which, upon its face, was void?

It seems the avowed purpose of appellant in carrying out what it contends are the rights conveyed, to clearly and absolutely obstruct and impede navigation by the filling in of the submerged lands to the extent of four acres.

The Court, again quoting from Mr. Justice Best, in Blundell vs. Catterall, 5 B. & A. 268, says: "The soil can only be transferred subject to the public trust, and gen-

eral usage shows that the public right has been accepted out of the grant of the soil."

Further quoting: "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."

THE STATE COULD NOT GRANT A FEE IN ITS SUBMERGED LANDS.

Passing from a review of this particular matter, it might be observed that the United States Government has created what is known as a public land system. It now embraces plans not contemplated by those ordinances passed to form a territorial Government in the Northwest Territory. It pertains to all of the new States, and recognizes the Government, sometimes as a municipal, and always as a proprietary, owner. It has granted land for purposes which have grown out of modern emergencies, and as the owner of land in the State of California, its title is as absolute after the formation of the State as before. Its ownership of Mission Rock, therefore, is not to be qualified by a strict construction of the principles laid down in Pollard's Lessee vs. Hagan; and, on the contrary, whatever is incident to title, whatever the United States may give to its grantee, it reserves for itself. Its title, then, in Mission Rock is absolute.

Let us look into the question of the title of the State in its submerged lands in and around Mission Rock and embracing within its exterior boundaries, the land in dispute. We contend, primarily, that the State as it comes into existence has, in the lands covered by the bay, the *jus publicum;* that in those lands, so far as they have not been otherwise disposed of by the United States

at a time prior to the formation of the State, it has the *jus privatum;* that in the *jus privatum* the quality of title is necessarily strained, in that it must forever subserve the interests of the *jus publicum.* In these particular lands, exclusive of Mission Rock, the State had the *jus publicum* and the *jus privatum.* And in so far as the former was not destroyed; in so far as it was not crippled nor hemmed in, nor interfered with nor obstructed; in so far as its essence remained whole and complete, the State could alienate the latter for certain purposes, but could never give a private title which would, in a measure even, destroy the trust of which the former is the essence. This is the limit of the sovereignty and authority of the State. It must be so.

In support of this doctrine we find reference to a comparatively recent case of the very highest authority. It is the case of the Illinois Central R. R. Co. vs. Illinois, 146 U. S. 387. The legislature of that State had granted to the Illinois Central Railroad Company certain tide or submerged lands in Lake Michigan. These lands had been filled in and converted by the company into uplands, and the legislature of the State repealed its act granting the land, and the repeal was held to be constitutional.

It cannot be comprehended how a title can be destroyed, if it is really a title in fee, by a simple repeal of an act of the legislature giving the title. So it must be held that the repealing clause was in the nature of a revocation of franchise. The Court seems to have held the repealing act valid; and the doctrine would seem to be established that a suit in equity to set aside the title was not necessary; and this construction seems to lead to the idea that the State never gave her title, but simply

that use or franchise to which, under her system, the State was limited.

Applying the same doctrine in the Mission Rock case, the State never did give its title to the lands in dispute. It needs no suit in equity on the part of the State to revoke the same, but, on the contrary, the State simply gave its franchise in and to its submerged lands, which long ago has been forfeited by the utter destruction and abandonment of the same.

Quoting from a learned Judge, who rendered the opinion, and whose memory has received the honor and respect of this Court, in speaking of the English doctrine, he says:

"The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from the private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide."

The idea of preserving the waters of the bay and the lands under them for navigable purposes and purposes of commerce seems to suggest the necessity of preserving the essence of the *jus publicum*. While it is the province of the general Government to regulate and control navigation, yet it is a duty devolved upon the State—a duty which she owes to the people to so preserve her title in these classes of lands as not to permit of a private encroachment upon these great rights. Contemplate this case under the light of this doctrine. What becomes of the right of the people in and to the waters of the bay?

What becomes of the State itself? Pertinent to this I will quote from the decision as follows:

"The railroad company never acquired by the reclamation from the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated," etc.

Again: "All lands, waters, materials, and privileges belonging to the State were granted solely for that purpose." Mind you, the words "to grant" purported to convey a fee, and were stronger as against the grantor than the words of that grant through which appellant claims its title from the State.

Again: "It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed."

It would occur that it would be immaterial as to the language expressed in the deed, or whatever its expression might be, because it cannot contravene public policy nor the rights of the public; and I have called attention to the language of the grant in this case to show that we might reasonably expect that it was considered by the Court merely a franchise.

In the Illinois case the land in question was "granted in fee to the railroad company, its successors and assigns." It is true that there was a condition in the grant which prevented obstructions to the harbor or an impairing of the public right of navigation. We apprehend that this restriction would have been preserved by law, outside of any language in the deed itself.

The Court, in commenting upon the language of the grant, says:

"This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration, whether the legislature was competent to make a grant of the kind."

In commenting upon this language it is noticeable that "and not as a license" is language used with more than ordinary significance. It seems to embody a direct implication, carrying with it a construction that the grant was a license, etc.

The Court, also commenting upon the grant made by the legislature says:

"And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the rail road company which did not previously exist."

This must be true, and whatever the language of the act of the legislature might have been, the only inference to be drawn from this language is, that it could not supersede the legitimate power of the legislature itself in disposing of its title, and the limit of that disposal is found where it encroaches upon the *jus publicum;* or, in other words, interferes in all or any of those essentials of right which pertain to the people.

Further quoting: "The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control

of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State."

Speaking of the title of the State in its soils under the water, the Court says:

"But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."

Speaking of this title of the State, the Court says:

"But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the Government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property."

It will be noticed that the case at bar presents a much stronger reason against the grantee than the Illinois case. While in the Illinois case the land involved was more considerable in extent, yet it was along the shore and was not in the nature of a considerable encroachment upon the navigable waters of the lake. It was simply extending the shore line. This case is far different.

While the prescribed possibilities of area are fourteen acres, yet upon that fourteen acres the Mission Rock Company proposes to be monarch of what it surveys—an empire unto itself. And if, in some future history of our State Government, it can avail itself of its delegated sovereignty, it may carry its work of invasion until it reaches the shore.

Still further commenting the Court says:

"General language sometimes found in opinions of the Courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like

lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

"The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between different points and the city, is a proposition that cannot be defended."

Some of the language above is especially observable and applicable in view of the interest in this case.

To requote: "And any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."

I apprehend that the Court in that case held that it was absolutely void in so far as it was a grant, because if it had been otherwise, it would have acquired an adjudication in equity to determine the same. If it had been construed as a grant, the legislature of the State could not have set it aside, because this is peculiarly the province of equity. But the fact that the legislature of the State did set it aside, and was held to have the power to do so, shows that it must have been nothing more than a franchise, as it was considered by the Court. Looking at it in that light, the Government of the United States cannot be held in this suit as having attacked a title collaterally.

The Court further says:

"It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to

its submerged lands and the power claimed by the railroad company to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listed so that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

"Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.

"We cannot, it is true, cite any authority where a grant of this kind has been held valid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass under the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The learned Judge in reviewing the decisions upon these questions and quoting from the Supreme Court of the State of New Jersey says as follows: "The sovereign power itself, therefore, cannot consistently with the prin-

ciples of the law of nature and the constitution of a well-ordered society make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."

THE RIPARIAN OWNER HAS THE FIRST RIGHT TO THE SOIL ADJACENT TO HIS UPLANDS.

We have endeavored to show in the foregoing that the United States Government can be the absolute owner of land; that it can stand in the same relation to property as the corporation which it creates, or the people whose sacred rights it insures. And this leads us to the conclusion that it can be a littoral or riparian owner, and as such subject to the benefits of accumulation and accretions, and invested with the rights pertaining to such property.

Admitting that the United States owned the rock known as Mission Rock and the adjacent rock; that the United States never parted with title, then the Government has the right to invoke the law which pertains to property, just the same as an individual—just the same as one of its own grantees. This premise leads us to the investigation of some primary and ruling principles pertaining to property rights, and first as to riparian ownership. This doctrine is not limited in its application to running streams over lands, but it is coextensive with the domain of water.

The Government of the United States stands in the ordinary relation of a proprietor; even if its municipal sovereignty ceases, it still has every proprietary right.

In Vansicle vs. Haines, 7 Nevada 249, it is held that the Government, as a riparian owner, stands in the same relation to its property as an individual.

The question of riparian ownership is discussed in Black's Pomeroy on Water Rights and shows the general tenor of the decisions, and the recent changes which the Courts have made. In chapter 13, section 229, the rule is laid down that "the rights of a riparian owner on a navigable stream are substantially the same as those enjoyed by a proprietor bounding on a nonnavigable stream."

These rights of course pertain to somewhat of a different problem in so far as they relate to those ordinary privileges incident to the shore. And it is held in that authority that these rights "depend upon the ownership of land contiguous to the shore, and are the same whether the proprietor of such land owns the soil under the water or not. This seems to be a quotation from Gould on Water Rights.

This authority refers to a decision rendered by Mr. Justice Miller in Yates vs. Milwaukee, 10 Wall. 497. There it is explicitly laid down that the owner of land bounded by a navigable stream is entitled to riparian rights, and among those rights are access to the navigable part of the river from the front of his lot, and the right to make a landing, wharves, and piers for his own use or for the use of the public, subject to such general rules and regulations as the legislature may seem proper to impose for the protection of the rights of the public.

One of the significant features of this decision is, that it holds riparian right as property and of value, and while it must be enjoyed in subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can be deprived only in accordance with established law, and, if necessary, that it be taken for the pubic good, upon due compensation.

This is simply a repetition of the rule, because we find it laid down in many decisions. It is indisputable that this riparian right, while a fiction in law, an incident merely, is yet esteemed by the authorities as property and valuable, and cannot be taken except through that constitutional test of which the public only can avail itself, to wit, due process of law and just compensation. If this is true it must be given its full and entire constitutional comprehension. In the particular instance in dispute we have found that the property was ruthlessly taken without compensation and without due process of law, and it must thereby be inferred that if it required a suit in condemnation, that the condemnation must have been for a public and not a private purpose; and without that suit title to these lands could never have passed to the appellant.

The learned Judge further says, that these rights could not even be impaired by the State for public works without such just compensation. These ideas are simply included within the doctrine that the only right in these particular submerged lands paramount to the right of the littoral owner was in the public, and only for the purposes of public utility, and any other source of title must result in failure. It is the riparian owner first, who has the right to construct wharves in front of his land or to fill in, if filling in is necessary and not in contravention of public policy, and it must follow that if someone else, a stranger, fills in the submerged lands surrounding him, that such filling in must inure to the person having the right primarily to do the filling.

This rule is carried out in relation to all real property, and bears upon the fixing of anything permanent on land belonging to another.

If it is claimed in this case by the appellant that the

Government of the United States acquiesced in the extension of its domain, in the filling in of these submerged lands, such acquiescence on the part of the Government could only be esteemed as an implied license on the part of the libelant to extend the land of the Government. The fact that the engineers of the Government marked the exterior lines to which these improvements could be carried is not in favor of the position of appellant, but is in favor of the position of the Government which was at that time exercising not only control over navigable waters, but an authority as a proprietor in and to the things pertaining to its own domain. This doctrine has so permeated our system that New York has adopted it as a law; and it is provided by statute that the land under the navigable waters cannot be granted by the State "to any person other than the proprietor of the adjacent land." This refers to proprietors of the adjacent uplands, 114 N. Y. 423, 21 N. E. Rep. 1066.

In section 240, chapter 14, *supra*, the author shows that the littoral owner has certain valuable rights which are property, and which cannot be taken from him without just compensation; and that if the State makes a grant of tide lands to a stranger, if the effect is to cut off the littoral owner from his access to the water, he must be compensated for the deprivation. In other words, it cannot be taken without due process of law.

And in section 244, the author, carrying this doctrine to its legal conclusions, lays down the rule that the littoral owner is vested with valuable rights and privileges; as that of access from his land to navigable water; the right to extend his land into the water by means of wharves, etc., and the right under the law of accretions to whatever lands by natural or artificial means are reclaimed from the sea.

It seems by this that he is entitled to the accretions, natural or artifical, as a littoral or riparian owner. And the authorities are uniform on the proposition that accretions, in order to inure to the benefit of the littoral owner, include those entirely artificial as well as those brought about by the force of natural laws. Between natural and artificial accretions no distinction is made. And it is so in this case; the Government owning Mission Rock would be entitled to all accretions which had gathered around it, whether through the process of the ages or by the hands of the Mission Rock Company working for its own investment and profit.

The learned author, in section 245, says that "the vast preponderance of authority, both in England and the United States, recognizes the existence in the littoral proprietor of a right of access from his land to the water, or of free communication between his land and the water, which is a valuable property right, and of which he cannot be deprived without due compensation."

And he observes that it is singular that the correctness of this proposition should be questioned, and styles the tenacity to the opposite doctrine as a "legal heresy."

In a subsequent section he shows how, at one time, the Court of Appeals of New York recognized an opposite doctrine; that the decision was followed in other States, and that thereby a fallacy in jurisprudence grew up and gained a foot hold until at last the Court in New York reversed itself and went back to original principles. And from that time, in that State, there has been no question as to the rights of the littoral owner, and this doctrine has taken new life and is fast growing in all of the States.

Of course, it is conceded always that whatever the rights of a littoral owner may be, they are subservient to

the rights of the State so far as the State manifests its sovereignty for the purpose of a proper control and regulation of the navigable waters within its boundaries.

And it is contended by this authority, in section 247, that the Supreme Court of the United States has settled this doctrine in the cases of Dutton vs. Strong, 1 Black, 23, Railroad Co. vs. Schurmeir, 7 Wall. 272, and Yates vs. Milwaukee, 10 Wall. 497.

Speaking of the Supreme Court the author says that "some of its later utterances may seem, at first sight, to militate against this statement. But the apparent discrepancy will vanish the moment they are examined with reference to their particular facts," and from that point further discusses the question.

Another authority quoted with reference to this is St. Louis vs. Rutz, 138 U. S. 226, 246.

The author observes: "That the inferior Federal Courts have uniformly agreed in supporting the same view. Thus, in a case in the Circuit Court for the Southern District of New York, it was held that where the owner of land is bounded on navigable water, he has a vested right to have the water remain contiguous to his property; and hence it is not permissible for the State, or its grantee of the land lying under the water, to fill into the water and build a new waterfront before such owner's land, and so cut off the landing from the water. The State, having granted land bounded on a way, cannot afterward remove the way without compensating the party injured." Citing Van Dolsen vs. Mayor of New York, 17 Fed. Rep. 817.

And in further discussing the English decisions, the author observes that "the riparian owner's right of access in that country is recognized and vindicated with equal clearness and emphasis."

In discussing the change in the attitude of the Courts, and especially with reference to the Courts of New York, the author says that "in 1889 a case arose in which the Court of Appeals ruled that the statute which authorized the grant of submerged lands only to the proprietors of the adjacent uplands amounted to a recognition of a right in such proprietors to have access to the water from their own lands." Citing Rumsey vs. New York, *supra.*

It will be noticed that in some of the States this doctrine is carried so far as to hold that the owner of a fee takes his land to low water mark; recognizing that the tide land is an appurtenant to his property.

In section 247 the author says that "the riparian rights are property, and cannot be taken away without paying just compensation therefor. Finally, the most approved textwriters agree in the opinion that the doctrine settled by the cases cited in this section is the only true and just doctrine on this subject. The theory that denies to the littoral owner the right of access as a valuable property right is characterized by them as founded on a 'narrow and technical course of reasoning,' as 'of at least doubtful authority,' and as open to very serious objection on grounds of constitutional law."

The author, in a subsequent section, holds that in California the precise question of a littoral owner's right of access to the water has never been passed upon, and intimates that the attitude assumed by the Courts with reference to the construction of wharves are foreshadowed and contrary to the decisions.

It is to be hoped that California will follow in the line of the Supreme Court of the United States, as that Court has held upon these same questions; because, as we have seen, this is a doctrine which is creeping westward like the course of Empire, and California, so far,

in the enlightenment of her doctrines, has not fallen behind the other States.

In section 240 this learned author says that "a review of the authorities leads us to the conclusion that the doctrine which denies to the littoral owner, as such, a valuable property right, including the privilege of free access from his land to the water, is contrary alike to authority, sound reason, justice, and the settled principles of constitutional law." That it is contrary to authority as such authority is modern. It is contrary to reason in view of the necessities surrounding such questions, and that it is contrary to justice is made manifest without illustration or elaboration. And the author speaks with regret that the Courts of Oregon and Washington could have committed themselves to the support of a doctrine so false and untenable, and observes that unless their decisions should be speedily overruled, they will crystallize into an inflexible rule of property, to the discredit of their jurisprudence and the perpetuation of injustice.

Section 252 speaks of the doctrine of accretion as being vindicated on the principle of natural justice; that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; that some say it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself. But that whatever may be the reason for the doctrine, it held that the same rule applies whether the accretion is attributable purely to natural causes or to the wrongful deposit by human agency of soil in the ocean or other public waters in front of the upland.

We think it is fair to assume in this connection that the right of the littoral owner in and to the submerged lands surrounding his own is paramount, except as against the *jus publicum;* that when a State assumes to grant this public right to a private individual, then it assumes to subvert it; and assuming the shape of a private right, it is immediately arrayed against another private right, pre-existing, first in law and first in justice.

I apprehend that if the State had desired at the time to give a franchise in these lands to an individual, and that franchise was in the interest of the public, and that public interest was ascertained to be paramount to any private interest in these rocks, that the right and title in the rocks themselves could have been extinguished in a Court at law, "by due process and just compensation." Then there would have been a legal ascertainment of a public interest in the matter which would have forever remained *res judicata.* Under these pretensions appellant might have been able to extend the area of his land, in so far only as it was compatible with that same public interest involved in this kind of title and made manifest by its purpose.

THE NEW ENGLAND DOCTRINE.

As it is claimed that California has the same rights of sovereignty as the original States, it is well to call attention to that sovereignty of the original States as it has been construed by their Courts.

In the case of Providence Steam Engine Co. vs. Providence etc. Steamship Co., 34 American Reports, 657, the New England doctrine is considerably discussed. We commend it to the careful perusal of the Court; however,

we cannot desist from calling the attention of the Court to some particular phrases.

On page 657, in speaking of the English doctrine, it is observed that "the king of England held the shores only as trustee for the public. That he had undertaken to grant away portions of the shore as private property, and to exclude the general public from their rights in it, was one of the grievances complained of and attempted to be redressed by Magna Charta."

So it appears by this, that one of the grievances rectified by the great Charta was that the king sought to vest in the individual what pertained to the public, as the State has done in the case at bar.

The Court further observes, on page 657, that "It has been very common to speak of the right of the State in the shores as a fee. This is proper only by analogy. To hold that the State owns the shores in fee in the same sense in which it owns a courthouse or a prison, or in which the United States own public lands, or a citizen may own land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right."

Citing Angell on Tide Waters, 24.

The Court further observes that "during the revolutionary war, and the distressful times which followed it, if the State had owned the fee of this valuable property it could not have escaped a sale. Town treasurers were committed to jail for the nonpayment of nearly every State tax that was ordered, and yet no town nor person ever thought of this as a property which the State owned in fee, or could sell to lessen taxation."

It appears that this has reference to the time when the States were themselves sovereign as nations, yet acting under the same limitations which did hedge the

king in England. It was held that the States, even in times of stress, were not able to part with the fee in the tide lands.

And the Court further observes that "to hold that the State holds the fee of the shore in such a sense that it can sell the shores would deprive nearly half of the land in this small State [referring to the State of Rhode Island] of a large portion of its value derived from bounding on the shore."

And it is held on page 658, that "the monstrous injustice that would result if such a doctrine were established as law is enough to show that it ought not be recognized as law."

Numerous authorities are quoted on the same page.

In commenting on page 659, the Court says: "The language of many of the decisions can be reconciled by holding that while the State does not own the shore in fee, properly speaking, and therefore cannot sell the shore to be held as private property, and so cut off the riparian owner from the water, it has the complete regulation and control of it for public purposes."

On page 660, the Court cites from Cooley's Constitutional Limitations, 544, note 1, wherein the learned author says: "So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for even those Courts which hold the fee in the soil under navigable waters to be in the State admit valuable riparian rights in the adjacent proprietor."

It must follow from this doctrine that if the rights of the riparian owner cannot be taken without compensation and through due process of law, that they cannot otherwise be appropriated; and when they are not so ap-

propriated they remain intact, and remaining intact, all of the benefits by accretions, whether natural or artificial, must inure to them. Upon this theory only can the doctrines enunciated have force and effect. To attempt to acquire title in direct violation of the law does not actually acquire it; and that which is done unlawfully in such attempt must inure to the benefit of the titles which remain unimpaired.

It is observed on page 661 that, "in Massachusetts, and Sullivan says in New Plymouth, the ordinance of 1640 extended the riparian rights of the flats. The principles of this ordinance were adopted in New Hampshire, though the ordinance never extended thither. Sullivan on Land Titles in Massachusetts, 284."

Continuing the Court says: "But it is probable that this ordinance only recognized and validated an existing usage. Sullivan on Land Titles, 285, says: 'From the first settlement of the colony of Massachusetts, that Government practiced upon the principles of this provision.' And Angell on Tide Waters, 225, says, that although the ordinance was afterward annulled, the usage continued, and now has the force of common law, quoting the words of the Supreme Judicial Court in Storer vs. Freeman, 6 Mass. 434, 438."

Also citing Angell on Tide Waters, 234, i. e., Commonwealth vs. Charlestown, 1 Pick. 180; 11 Am. Dec. 161; Commonwealth vs. Pierce, 2 Dane Abridg. 696.

In page 663 the Court says: "The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland."

It must be conceded that if the right lies in the riparian owner, that whatever is done must inure to the benefit of that right.

The Court quotes from the language of Mr. Justice Taney in Martin vs. Wadell, 16 Pet. 367, 414, which says:

"The men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment and unable to take a shellfish from its bottom, or fasten there a stake or even bathe in its waters, without becoming a trespasser upon the rights of another."

Is it not plainly seen that this doctrine is a sacred part of the rights of owners recognized in that section of our country where individual rights were first declared? Is it not a part of the old New England system—a system which received its first impulse of Anglo-Saxon law from those rights which after many years of suffering and oppression were finally declared in the great charta?

The Court, on page 663, says: "And he holds every one of these rights by as sacred a tenure as he holds the lands from which they emenate. The State cannot either directly or indirectly, divest him of any of these rights, except by a constitutional exercise of the power to appropriate private property for public purposes."

It does not seem in the case at bar that the State has recognized a constitutional authority by due process of law and after just compensation, but that it has done that which this language says it cannot do "either directly or indirectly"; to wit, deprived the United States of one of its constitutional rights.

On page 664 the learned Judge speaks of the doctrine of Wisconsin, and adduces therefrom this language:

"They approve and follow their former decision, holding that the riparian owner on a navigable river has rights therein differing in kind and degree from the rights of the public. He has the right of access to and from his land, and to all the facilities which the location of the land gives him, and this, although the water's edge is the boundary of his title."

On page 665, the Court quotes from Lorman vs. Benson, 8 Mich. 18, showing that the Michigan doctrine held that the riparian owner is entitled to every right consistent with the public easement. And also from Rice vs. Ruddiman, 10 Mich. 125, and also Barron vs. Mayor & City Council of Baltimore, 2 Am. Jur., 203, showing the Maryland doctrine that "it was held that the owner had the right of access to his land by water, and that this was property."

On page 666, in Baltimore & O. R. R. Co. vs. Chase, 43 Md. 23, it was held that the riparian owner on navigable water had the right of access from the front of his lot to erect wharves, etc., subject to regulation by the legislature, and that these rights are property; and that while they must be enjoyed in subjection to the rights of the public, the owner cannot be deprived of them.

And referring to the doctrine in the State of Connecticut, the Court says: "It was laid down by Judge Swift that while the sea and navigable waters are common for certain purposes, the owners of the bank have a right to the soil covered with water as far as they can occupy, that is, to the channel. It was subsequently explained that this does not mean that the riparian owners are seised, but only that they have a right to occupy, and that it properly termed a franchise. The usage to wharf out is recognized as an immemorial usage, which makes a common law. It exclusively belongs to the riparian

owner, and no one has any right to do anything to his injury in front of his land."

Citing 1 Swift's System, c. 22, p. 341;
East Haven vs. Hemingway, 7 Conn. 186;
Chapman vs. Kimball, 9 Id. 38;
Nichols vs. Lewis, 15 Id. 137;
Simons vs. French, 25 Id. 346, 352.

The Court further says: "The right to wharf out has also been generally recognized in the other States." And refers to

Clement vs. Burns, 43 N. H. 609, 617;
Northwestern Union Packet Co. vs. Atlee, 2 Dill. 479, 485.

Further, on page 667, the Court says: "In Massachusetts, under their Colony Ordinance of 1640, which, as I have before said, was probably only designed to recognize and limit an existing usage, the riparian owner had a qualified right to low-water mark, provided it was not more than one hundred rods, and a man might sell these flats separately."

Citing many cases.

And this seems to be the New England doctrine which embraces the particular kind of sovereignty claimed by subsequent States in and to their tide and submerged lands.

Since we have invoked the sovereignty of the original States, and have claimed that we are entitled to its just measure by reason of being admitted upon an equal footing with them, let us at least do every deference to the

spirit which we would summon now and be guided and controlled by it.

We will conclude a discussion of this doctrine with the observation that the tide and submerged lands included in a Mexican grant were finally excluded therefrom by confirmation of our Courts, for the reason that the public owned them.

If it had been deemed that the title in these lands vested in the State as a proprietor only, the Courts probably would have confirmed them to the grantees under the Mexican Government, because, as between individual rights, these would have been superior. But the question was decided in favor of the State, because the State represented a *sovereign right;* that is, the sovereignty of the people. This it cannot give away. Its title is an incident of sovereignty; it cannot give away an incident of sovereignty. This incident is "made the darling of its precious eye; to lose 't or give 't away were such perdition as nothing else could match."

PARAMOUNT SOVEREIGNTY OF THE GENERAL GOVERNMENT.

Let us proceed now upon the theory that the Government, on the 9th of September, 1850, owned the rocks; that the appellant, Mission Rock Company, never claimed title from the general Government, and that the only title it had was from the State of California, whose ownership rested upon the principle that it was an incident of sovereignty. This presents to us a question which has agitated the councils of the nation for more than one hundred years; one fought out on battle fields, and at last decided, as we think, by the Courts, in favor of that contention on the part of the Federal Government which must insure to it a paramount sovereignty

where it has a sovereignty at all; exclusive, carrying with it everything that might be necessary and pertinent to its supremacy.

If the Government of the United States owns these islands, it has by reason of its sovereignty, certain exclusive rights. Upon these rights the State cannot encroach. The State cannot destroy them; the State cannot destroy any particular element of them when the destruction of that element reaches at the fundamental right itself.

An application of this principle: If the State itself, or its grantee claiming title to the submerged lands around the rock could fill the same up with accretions, adding to the area of the rocks four acres instead of 14-100 and 1-100 of an acre then we will see that the sovereignty of the State encroaches upon the sovereignty of the nation until the latter is wholly destroyed and unable to exercise its necessary and ordinary functions.

Let us examine the question as to whether a State can do this. We know that if a State can do it in one instance it can do it in many. There must be a certainty in doctrines of this kind, and we submit that this certainty has been arrived at through the process of the discussions of more than one hundred years. There must be a certainty—a dividing line between the sovereignty of the United States and the sovereignty of the State. The former cannot usurp; the latter cannot encroach.

The Mexican Republic attempted to pattern after our own institutions, and in many particulars adopted our model of Government. For a long time it led to violence, because an intermixture of sovereignty was tolerated; there was the gradual encroachment of the one upon the other; there was no settlement as to which was

paramount. In the case of the United States it is different. There is one rule and but one rule. It is this: Whatever sovereignty is given to the United States, though limited, is paramount and exclusive. Every other power is reserved to the States themselves. The right of holding property acquired by treaty is just as much a right of the general Government as though it was one of those legislative sanctions enumerated in article 1, section 8, of the Constitution. The right of holding territory is an inferred right. It is incident to the exercise of the powers of Government—incident to the right of making treaties, of declaring war and concluding peace, and its sovereignty exists just as thoroughly and completely as it does in any other instance. It has as much right to own land as it has to own a gun. Can the State encroach upon it? If it can, it can destroy it. It would be tedious to discuss all of the decisions which point out clearly the fact that whatever is delegated to the general Government and pertains to its sovereignty is of necessity exclusive. These are few and limited, but within the sphere of each it is absolute. The limitation upon such sovereignty is in relation to things, and not in relation to the extent of its operation when relating to things over which it is sovereign.

De Tocqueville, in his "Democracy in America," in speaking of the jurisdiction of the Courts of the United States, says: "The Union as it was established in 1798 possesses, it is true, a limited supremacy; but it was intended that within its limits it should form one and the same people. Within those limits the Union is sovereign. When this point is established and admitted the inference is easy; for it is acknowledged that the United States constitute one and the same people within the bounds prescribed by their Constitution. It is impos-

sible to refuse them the rights which belong to other nations."

Again, in speaking of the Union, he says: "In relation to the same matters it constitutes a people and that in relation to all the rest it is a nonentity."

This seems to state the doctrine that what is reserved to the States creates an exclusive State sovereignty, but with reference to what the States have relinquished, the general Government has an absolute sovereignty as a nation.

Addressing these principles to the question in issue, can it possibly be held that by surrounding this island as they have, it becomes the right of the sovereign State to encroach upon and destroy all of those elements of sovereignty residing in the general Government.

The same learned author says further:

"But the inference to be drawn is, that in the laws relating to these matters the Union possesses all of the rights of absolute sovereignty."

I apprehend that this refers to the laws of the United States, one of which reserves in the United States its title to its lands; that is, those lands which are not confirmed to individuals, and those which do not pass to the State by reason of its sovereignty.

Further: "We have shown that the principal aim of the legislators of 1789 was to divide the sovereign authority into two parts. In one they placed the control of the several interests of its component States. Their chief solicitude was to arm the Federal Government with sufficient power to enable it to resist within its sphere the encroachments of the several States."

Permit the suggestion, that when the general Government of the United States seeks to protect its right of title to its lands, it is acting "within its sphere," and it

has the right to invoke its Courts to protect itself from "the encroachments of the several States." How can there, in the very nature of our Government, be a divided authority or a divided sovereignty, as it refers to a particular thing? It is confessed that there cannot be, in general. Does not the same rule apply with reference to titles? What is the difference whether the Government of the United States seeks to defend its own title, or whether its citizen seeks to invoke the laws in defending a title given him by patent? Is the latter more secure than the former? Does it embody any other or greater principle?

In his celebrated reply to Hayne, Daniel Webster, in speaking of the necessity of preserving the relations between the States, and of acknowledging the dividing line between their authority, said:

"The States are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law."

In speaking of a supreme law, he was referring to a paramount sovereignty which resided in the Federal Government.

Further: "The State legislatures as political bodies, however sovereign, are yet not sovereign over the people."

"So far as the people have given power to the general Government, so far the grant is unquestionably good, and the Government holds of the people and not of the State Governments."

So far as the people have restrained State sovereignty by the expression of their will in the Constitution of the United States, so far it must be admitted State sovereignty is effectually controlled." In other words, so far as it is effectually controlled, it does not exist; and while the State of California had a sovereignty in its

tide lands, it did not exist in the face of that sovereignty necessarily residing in the general Government with reference to its title to these rocks. The State could not, by reason of its sovereignty in its submerged lands, destroy the submerged lands and still retain sovereignty which existed only by reason of the element which it removed, and the destruction of which renders impossible the ordinary exercise of the sovereign right of the general Government in and to its own exclusive property.

Mr. Chief Justice Marshall, in McCulloch vs. The State of Maryland, 4 Wheat. 316, said:

"The Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily, from its nature. It is the Government of all; it represents all; its powers are delegated by all and acts for all. The nation, on these subjects on which it can act, must necessarily bind its component parts. The Government of the United States, then, though limited in its power, is supreme, and its laws when made in pursuance of the Constitution form the supreme law of the land, anything in the Constitution or laws of any State notwithstanding."

Mr. Chief Justice Taney in the Dred Scott case, says:

"The principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent, within their own limits, in their internal and domestic concerns, and bound together as one people by a general Government possessing certain restricted and enumerated powers delegated to it by the people of the several States, exercising supreme authority within the scope of the powers granted to it throughout the dominion of the United States."

Once admitting that the Government of the United States owned the rocks, that in its ownership it had the

right to exercise the ordinary functions of a sovereign, that the states have no right to encroach upon the sovereignty of the nation when it is conforming to the "sphere of its action," then the encroachment of the State, or any grantee acting under it, is an encroachment upon a paramount sovereignty operating within the sphere of a necessary and legitimate function.

On the 9th day of September, 1850, Congress passed an act admitting California into the Union. (9th U. S. Stats. at Large, p. 452.)

One of the conditions of this act is, that the people of the State, "through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law, and do no act, whereby the title of the United States to, and right to dispose of the same, shall be impaired or questioned."

Can it possibly be stated that to recognize the claims of appellant would not be a destruction, or, at least, an "impairment," of the rights of the United States in the public domain as it is reserved by this act? As a practical question, has not the State in this instance sought to impair the right of the United States to dispose of its title in and to Mission Rock? To answer this question in the negative, and to say that the right of such disposal is not impaired, is to confess that title is still in the United States, and all of the incidents of title which have been builded around the rock by the State itself, and which would otherwise destroy the title of the United States, is but an evidence of an intention to add to the public domain, rather than to take away from it.

While the powers of the Federal Government are delegated, yet when once given they are paramount and ex-

clusive. To invade one of the incidents is to invade the power itself.

Judge Cooley, in section XV of his "Principles of Constitutional Law," in relation to the powers of Congress, speaking of the general clause in the Constitution which empowers the Congress "to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," says:

"The import of the clause is, that Congress shall have all of the incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically given, nor is it a grant of any new power of Congress, but is merely a declaration for the removal of all uncertainty, that the means for carrying into execution those otherwise granted are included in the grant. The grant of the principal must include the necessary and proper incidents without which the grant would be ineffectual. It would be as undesirable as it would be impracticable to enumerate all the means by the use of which the powers expressly conferred shall be exercised, since what may be suitable and proper means at one period may be wholly unsuitable and ineffectual at another period, under conditions which had not been anticipated, and thus the iron rule of limitation to means specified would defeat the grant itself. The clause above recited distinctly negatives any suggestion that so unwise and impracticable a restriction was intended. Those who made the Constitution conferred upon the Government of their creation sovereign powers; they prescribed for it a sphere of action, limited, indeed, as respects subjects and purposes, but within which it should move with supreme

authority, untrammeled except by the restraints which were expressly imposed or which were implied in the continued existence of the States and of free institutions. But there cannot be such a thing as a sovereign without a choice of the means by which to exercise sovereign powers."

"In any particular in which the powers of the United States are contemplated, the necessity for the exercise of incidental powers is apparent. Congress, as a means to the collection of its revenues, provides for the seizure, sale, or confiscation of property; in its regulation of commerce, builds lighthouses and removes obstructions from harbors; in establishing postoffices, prescribes the rate of postage, provides for the appointment of postmasters and other agents, for the free delivery of postal matter, and for the sale and payment of postal money orders, etc. But whatever may be the power it exercises in these and other cases it must provide against its being rendered nugatory, and its purpose thwarted, by enacting laws for the punishment of those who commit acts which tend to obstruct, defeat or impair the force of their due execution, or who neglects duties essential to the accomplishment of the ends designed. Without these and similar incidental powers the Government would be as completely without the means of perpetuating its existence as was the Constitution itself."

It is a natural inference from all of these authorities quoted that in order for the Government to maintain its sovereignty, we must conclude that such sovereignty is a necessity where it does exist; that where it does exist, the full measure of it will be found to be necessary, and that where it is necessary, all incidents thereto must be implied.

The question might be asked, Why do we invoke this recognized principle in the settlement of a conflicting claim to territory between the United States and the State? This may be answered by the question, Why does it not pertain to matters of this kind? If the State has sovereignty in its tide lands, does not that in itself raise the question of sovereignty between them? Where the question of sovereignty is raised between the two, and apparently necessary for the exercise of the rights of both, does it not follow that it must be solved in favor of the Federal Government?

As an illustration of the serious damage which could result from the contention of appellant, we might instance Alcatraz Island, situated in the bay of San Francisco, overlooking the Golden Gate, and upon which giant fortifications have been constructed for the protection of the harbor. Looking beyond the time when these fortifications were erected, we can see it in our mind's eye, a barren rock, larger, it is true, yet of the same character and quality of soil, as the ones in dispute. Suppose the State of California claiming title by reason of its sovereignty, had given it by grant to some individual, including therein fourteen acres of submerged lands contiguous to and surrounding it; suppose the grantee had filled in these submerged lands, thereby extending the area of Alcatraz into a larger and more important island at the very entrance of the harbor; under these circumstances could the law have so operated, and could the right of the grantee of the State been so extended as to encroach upon, absorb, and finally destroy that paramount sovereignty of the Government; by which it is enabled now to maintain the very works constructed thereon? Is this "the round and top of sovereignty"? If so, there is nothing serious in Government; "all is but

toys, renown and grace is dead; the wine of life is drawn and the mere lees is left this vault to brag of." What is the answer to this? On page 42 of their brief, learned counsel say: "That the United States engineers, with the approval of the War Department, have drawn the line beyond which the plaintiff in error shall not use its own land"; that its ownership "beyond this line could avail it nothing." So it seems to be confessed at last that its rights and its title are subservient to the paramount sovereignty of the general Government. That its quality of title depends upon the sanction of the general Government. Then we come to the inquiry, Can the War Department confer title or change the nature of a title conferred by the State? Should the War Department by a permissive act allow plaintiff in error to fill in around Alcatraz, could such permission be construed into conferring title? Does appellant here confess that it had not the right under its own title from the State to do this filling, and that it had to secure the right from the Government? Then we are to infer that this right was not an incident to its own title. If this is so, what becomes of its labors under the license from the Government? If a new quality of title is made under this license it would appear that this title would inure to the benefit of the one granting the license. If the right to fill in was vested by license of the Government and not as an incident of original title, then how can it be made the basis of a new title in plaintiff in error? There can be no permissive act of the War Deparment which can be construed as forfeiting the vested rights of the sovereign, and if a permission was granted which resulted in the filling in of contiguous land to a Government island, such permission must be construed into a license presumed to result in a benefit to, rather than as a depriva-

tion of, the Government and its vested rights. It is fatal to say that the quality of appellant's title depends upon the act of the War Department, for it must be assumed that the sovereign would permit the encroachment only upon the presumption that it would inure to its own benefit. There is no treatise on law or upon government from the time that the scholars under Justinian compiled the Roman laws, to Blackstone, and from Blackstone till now, which will permit the sovereignty of a nation to be encroached upon and destroyed under a pretense of an agent giving a license to perform an act against the interests and to the destruction of the vested rights of the Government.

In conclusion, we desire to urge that it has been the policy of all Governments to guard with jealous care their property in islands. In the hands of enemies or neutrals they become elements of menace; but when protected, they become protectors in turn and afford positions of strength.

The Mexican Government granted some of its islands, upon the theory only that the grantees would be more able than the Government to keep them from falling into the hands of the adventurers on the sea. The United States Government, equally jealous, seeks to protect them herself and no powerful grantee can give strength to its cause nor justice to its right.

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